United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7664

To be argued by
JACK HART

United States Court of Appeals

For the Second Circuit

CHAMPION INTERNATIONAL CORPORATION,

Plaintiff-Appellee,

against

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

Issues Presented for Review

This action presents for determination the coverage afforded by an umbrella excess liability policy and by the pertinent underlying comprehensive general liability policies in connection with certain "products hazard" losses incurred by the insured. The issues presented for review are:

1. What constitutes an "occurrence" within the provisions of the instant policies;

2. Under the provisions of the underlying comprehensive general liability policies, what is the proper application of (a) the deductible of $5,000 "per occurrence" and of (b) the limits of liability of $100,000 for "each occurrence" and of $200,000 "aggregate" in each annual period;

3. Was it shown, as required by the policies, that the property damage for which recovery is sought occurred "during the policy period".

Statement of the Case

Nature of the Case

Plaintiff Champion International Corporation (Champion)* seeks recovery of $1 million, plus interest, on an "Umbrella Excess Third Party Liability Policy" (the Umbrella Excess policy) (JA 447-489)** issued to it by defendant Continental Casualty Company (Continental). The claim is based on products liability losses incurred when vinyl laminated panels purchased by Champion over a period of time, sold by Champion over a period of time to twenty-six manufacturers (JA 238), and installed by the different manufacturers over a period of time and in various parts of the country in vehicles such as houseboats, housetrailers, and campers, proved to be defective and delaminated.

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* Champion's name was changed from U.S. Plywood-Champion Papers, Inc. after commencement of this action.

** References to parts of the record reproduced in the joint appendix will be designated by the letters "JA" followed by the page in the joint appendix. Otherwise, references to exhibits will be by exhibit number as indicated in the index to the record on appeal and references to other documents not reproduced in the joint appendix will be to the part of the record and pages involved; *e.g.*, Response to Request for Admissions, p. 3.

The policy period of Continental's Umbrella Excess policy was three years from November 30, 1967, to November 30, 1970 (JA 447), and the policy, subject to its terms, afforded excess coverage of $1 million for "any one occurrence", and $1 million "in the aggregate" for each annual period, over the primary coverages afforded Champion by "underlying insurance" contained in some 23 specifically described underlying policies (JA 447, 459-467). One of the 23 underlying policies was "Comprehensive General Liability with the Liberty Mutual Insurance Company" (the Liberty Mutual policy) (JA 462).

The Liberty Mutual policy (JA 491-539) was written on an annual basis, the annual policy period running from October 31 of the year of issuance to October 31 the following year (JA 490a). The Liberty Mutual policy* was reissued from year to year (JA 20) and remained in full effect, without change in its provisions, during the three year policy period of Continental's Umbrella Excess policy.

The Liberty Mutual policy included, among its several coverages, coverage for the "products hazard" (JA 493) with respect to which the limits of liability for each annual policy period were "$100,000 each occurrence; $200,000 aggregate", subject, however, to a $5,000 deductible "per occurrence" for property damage liability (JA 490a, 510-511). There was no deductible under the products hazard for bodily injury liability; the $5,000 per occurrence deductible applied "only to Property Damage arising out of the completed operation hazard or product hazard" (JA

* In this brief, the words "policy" and "policies" are used interchangeably with reference to Liberty Mutual to refer to the two or more Liberty Mutual policies in effect during the pertinent periods.

511). There was no deductible for either bodily injury or property damage under any of the other coverages of the Liberty Mutual policy.

The "Schedule of Underlying Policies" attached to Continental's Umbrella Excess policy specifically referred to the deductible in respect of products liability contained in the Liberty Mutual policy, as follows:

> "Property Damage — $100,000 ultimate net loss in respect of each occurrence (it is understood that in respect of Products Liability the foregoing is subject to a $5,000 deductible)" (JA 462).

It is conceded by Champion that in no case did the damage to any one vehicle amount to as much as $5,000 (JA 106-108).

The Contentions of the Parties

Champion contends (1) that the losses due to delaminations which admittedly took place over an extended period of time in many parts of the country, in some 1400 vehicles manufactured over a period of many months by 26 different manufacturers in various States, who purchased the panels in small lots over a period of many months from Champion which, in turn, had purchased the panels in small lots over a period of many months, were due to only "one occurrence", and (2) that, therefore, its insurance companies should not be held liable beyond their "one occurrence" limit of liability. The result of this contention would be that only one $5,000 deductible and only one $100,000 "each occurrence" limit of liability under the Liberty Mutual

policies would be applied to all 1400 vehicles and that the coverage of Continental's Umbrella Excess policy would be invoked after the losses on all 1400 vehicles reached a total of $105,000.

Continental contends that Champion's losses arose from many "occurrences"; that the damage to each separate vehicle constituted a separate "occurrence"; that the $5,000 deductible must be applied for each of those "occurrences"; and that, after application of the deductibles and the limits of liability of the underlying Liberty Mutual policies, there will be no excess loss for which Continental must respond. Continental further contends that, since Champion introduced no evidence of when the property damage took place, it is impossible to determine how many of the annual Liberty Mutual policies must respond and whether or not the damage was within the policy period, and thus within the coverage, of the Umbrella Excess policy.

Liberty Mutual Not a Party

Champion did not join Liberty Mutual as a party in this action. The reason for this suggests itself in the fact that the Liberty Mutual policy was of the retrospective type; *i.e.*, Champion was to a large extent a self-insurer with respect to the coverages contained in the Liberty Mutual policy (JA 537-538; Exhibit 8, tab 4).

There appearing to be no basis on which Continental could bring in Liberty Mutual as a party, Continental, in April, 1970, before this action was started, requested Liberty Mutual to agree to binding arbitration to determine the respective coverages of their policies so that respon-

sibility, if any, could be determined (JA 176, 310). Since, for all practical purposes, an appeal would not lie from an arbitration decision, this case would have been disposed of over five years ago. Liberty Mutual rejected this offer by letter dated May 6, 1970, thus avoiding the necessity of urging, in the context of a litigation, the construction of the policy submitted by Champion (JA 176).

In *Scott* v. *Keever*, 212 Kan. 719, 512 P.2d 346 (1973), Liberty Mutual successfully took the position that its policy

> "* * * by the express, unambiguous provisions thereof exclude[s] protection against accidents arising subsequent to the expiration date of the policy, regardless of the fact that the sale of the defective product occurred during the policy period." 212 Kan. at 721, 512 P.2d at 348.

The Proceedings Below

The action was commenced in late November, 1970 in the State Court and removed on the ground of diversity to the Federal Court. A detailed chronology of subsequent events may be found in the affidavit of Jack Hart, sworn to June 19, 1975, submitted in opposition to Champion's motion to block Continental's deposition of the officer of Champion most familiar with the details of the alleged losses (JA 175-184). There cannot be any doubt that the delay of some five years between the start of the action and the entry of judgment was not in the slightest degree attributable to Continental.

Pre-Trial Conference Before Judge Pollack

On July 2, 1974, the parties appeared before Judge Pollack for a "settlement or disposition" conference. Champion's counsel, who had previously made the same suggestion on May 17, 1974 before Magistrate Jacobs, stated that in his opinion, the "liability issue" could be decided without the facts and that Champion had it in mind to move for summary judgment on this issue. Judge Pollack rejected this suggestion and directed (a) that Champion make a full disclosure of its sales records, claim files, the Liberty Mutual policies, and the retrospective rating plan (self-insurance) between Champion and Liberty Mutual; (b) that the parties prepare "agreed and disputed findings of fact" as outlined in his article in the *New York Law Journal* of March 28, 1974; and (c) that such "agreed and disputed findings" should be completed and submitted to Judge Pollack at the next conference which he scheduled for September 27, 1974 (JA 180).

Early in September, 1974, Champion's counsel wrote to Judge Pollack requesting an adjournment of the conference scheduled for September 27, 1974 to on or after October 25, 1974 because, as the letter said, Champion was still collecting the facts. This letter said in part:

> "Pursuant to Your Honor's directions we are collecting and producing records and data relating to the sales of these panels to customers, the use of these panels by U.S. Plywood's customers to produce completed products; property damage claims arising from the delamination of these panels in completed products; and the investigation, settlement and payment of these claims by Liberty Mutual Insurance Company on behalf of U.S. Plywood. This material is being collected

and reviewed in order to provide a basis for agreed and disputed findings of fact which the parties are now scheduled to complete and submit to Your Honor at a conference on September 27, 1974. We have been informed by several of the parties furnishing data to us that their review and production of their records will not be completed for at least three weeks'' (JA 181-182).

On September 10, 1974, the parties were advised that the conference before Judge Pollack had been adjourned to October 29, 1974.

Proceedings Before Judge Solomon

On September 16, 1974, the parties were advised that the case had been reassigned to Judge Solomon and a conference scheduled for September 20, 1974. At the conference on September 20, 1974, Judge Solomon (a) denied the request of both parties for an adjournment to October 29, 1974, although Champion's counsel stated that he was still obtaining documentation in support of the claim (JA 96, 98) and (b) stated: ''I am going to bifurcate the case and decide the issue of liability'' (JA 99). He directed that simultaneous briefs be filed on October 3, 1974, with reply briefs by October 9, 1974, and set a hearing for October 16, 1974 (JA 99).

On October 16, 1974, a hearing was held before Judge Solomon at which there were no live witnesses, although certain documents such as the insurance policies involved were handed up to the Court (JA 105-157). At the conclusion of the argument, Judge Solomon stated in part, ''If I decide in favor of the plaintiff, I will give the defendant

an opportunity, if they so desire, to appeal the ruling immediately. So, you won't have to go to the trouble of looking over all of those invoices at this time'' (JA 152).*

In accordance with Judge Solomon's direction post-argument briefs were submitted on October 23, 1974.

On May 1, 1975, Judge Solomon rendered his opinion on the issue of liability, holding as follows:

> ''I do not know whether the Continental policy was ever intended to cover this type of loss. But Continental's admissions that this is the type of loss which the policy was designed to cover require me to decide this case solely on whether there was one occurrence which proximately resulted in damage to many vehicles, or whether the damage suffered by each of those vehicles was a separate occurrence.
>
> ''On this issue, I find in favor of the plaintiff because I find that the contested language is ambiguous. The interpretation urged by the plaintiff may not be the only reasonable interpretation, but it is a reasonable one. That is all plaintiff is required to prove'' (JA 164-165).

By memorandum dated June 12, 1975, Judge Solomon stated he would set the issue of damages for trial not later than August 21, 1975, later changed by Judge Solomon to September 29, 1975 (JA 166).

On September 29, 1975, a hearing before Judge Solomon was held on the issue of damages. This hearing consisted almost entirely of argumen' and colloquy (JA 195-301).

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* On June 12, 1975, after his opinion on liability had been rendered, Judge Solomon issued a memorandum which, in part, stated that he did "not propose to enter an order from which an interlocutory appeal may be taken" (JA 166).

On October 31, 1975, Judge Solomon rendered his "Memorandum Opinion" holding as follows:

> "Plaintiff paid out in excess of $1,000,000.00 over and above the $100,000 paid by Liberty Mutual under its policy and the $5,000 deductible under defendant's policy.
>
> "I therefore hold that plaintiff is entitled to a judgment against the defendant for $1,000,000.00 with interest from the dates plaintiff made payments to Liberty Mutual in settlement of the claims against plaintiff" (JA 303-304).

Judgment in the amount of $1,320,139.64 was entered on November 18, 1975 (JA 305-306).

The Opinions Below

We believe it is not possible to tell from the opinions below alone what the District Judge regarded as being the "one occurrence which proximately resulted in damage to many vehicles," nor which "contested language" he found was "ambiguous." However, on the basis of the clarifications elicited from the District Judge at the hearing on the issue of damages, we believe it is clear that he regarded the "one occurrence" as being (a) the "fact" that all of the panels which delaminated were purchased by Champion from one source, Continental Vinyl Products Corporation (Continental Vinyl) during the three year period of Continental's Umbrella Excess policy (JA 230, 258-259) and (b) the "fact" that the numerous sales by Champion, admittedly in small lots to the 26 different manufacturers of vehicles, were made during the three year Continental policy period (JA 251, 252, 263, 289).

The District Judge ruled explicitly that the dates when the vehicles were manufactured and the dates when the delaminations took place were not material to the determination of this case (JA 274).

Apparently, then, the District Judge held that all the damages which proximately resulted from the "one occurrence," *i.e.*, all delaminations of panels which occurred in the approximately 1400 vehicles, regardless of when the vehicles were manufactured or when the delaminations took place, whether within or without the underlying or Umbrella Excess policy periods, would involve only one $5,000 deductible and would come within the "one occurrence" limit of liability of the underlying Liberty Mutual policy and of the Continental Umbrella Excess policy. Accordingly, upon a showing that Champion issued a number of checks to Liberty Mutual in an amount exceeding $1,105,000 (one $5,000 deductible; one $100,000 Liberty Mutual "one occurrence" limit; and one $1 million Umbrella Excess "one occurrence" limit), to cover the claims paid by Liberty Mutual and Liberty Mutual's fees for handling the claims, the District Judge signed a judgment allowing a recovery against Continental in the amount of $1 million plus interest, making a total of $1,320,139.64 (JA 305-306).

The opinions made no reference to the fact that, while Continental's Umbrella Excess policy was for a three year period, the underlying Liberty Mutual policies were for annual periods. As Champion asserted and as the District Court stated, the "facts" relied on by Champion in support of its claim against Continental took place "in 1969 and 1970," *i.e.*, in at least two annual Liberty Mutual periods. It would seem therefore that the District Court held that

only one Liberty Mutual annual policy would be involved even with respect to damage claims that arose from defective panels which were purchased by Champion, sold by Champion, installed in vehicles and delaminated in subsequent Liberty Mutual annual policy periods.

We respectfully believe that the District Judge, who cited no authority for his holding of "one occurrence," was clearly in error and in direct disagreement with the holdings of a rather extensive number of Courts, including this Court, as to the meaning of "occurrence" in a comprehensive general liability policy.

We further believe that it is inconceivable that in the absence of a deductible and an underlying self-insurance policy, any insured would urge the sharply restricted construction of the limits of liability afforded by the policies which Champion contended for and the District Court sustained in this case.

The Facts

Except for the insurance policies themselves, the facts of this case were presented only in outline, as clearly appears from both the District Court's opinion, which constituted its findings of fact and conclusions of law, and from the entire record.

At the conference on September 20, 1974, when Judge Solomon ruled that he would "bifurcate the case and decide the issue of liability" (JA 99), he stated that "certain examples" would be enough "to adequately present" the liability issue to the Court since, as he said, "In my view

it involves the interpretation of the contract of insurance" (JA 102-103).

On the "liability issue", no live testimony was presented and the only documents submitted were (a) the policies in question including the retrospective premium endorsement to the Liberty Mutual policies, (b) the transcripts of depositions on written questions of five manufacturers of vehicles, (c) Champion's answers and objections to interrogatories, and (d) an excerpt from Moody's Industrial Manual concerning the size and diversity of Champion's enterprises. On the hearing on damages, little additional evidence was offered. The only live witness, Fred G. Mason, an employee of Liberty Mutual, was called by Champion and gave limited and immaterial testimony (JA 15-23, 86-89). The only documents offered were 15 checks from Champion to Liberty Mutual totalling approximately $1.5 million (JA 186-193); a purported record of payments by Liberty Mutual to claimants, most of which were made outside of Continental's policy period, admitted *sua sponte* by the District Court after its offer had been withdrawn by Champion's counsel (JA 285, 298); and two letters and a telegram between Champion and Liberty Mutual, admitted over Continental's objection and, in any event, clearly immaterial (JA 211-212, 307-313).

Outline of the Facts

During the years 1969 and 1970, Champion, among its many other business activities, purchased and resold vinyl laminated plywood panels allegedly manufactured by Continental Vinyl (JA 159). The panels consisted of a film of vinyl, simulating the grain and color of expensive panel-

ling, bonded to a sheet of plywood, and came in a variety of sizes and thicknesses and in a variety of styles known by names such as Del Mar Walnut, Avalon Walnut, Monterey Oak, and Dark Pecan (JA 370).

Champion, over a period of many months, sold varying amounts of panels, in varying styles, sizes and thicknesses, to 26 different manufacturers of houseboats, housetrailers, motor homes and campers located in various parts of the United States who used the panels in the construction of the interiors of such vehicles (JA 159).

The panels usually were sold by Champion to the vehicle manufacturers in relatively small lots as they were required from time to time by the manufacturers' production schedules and either were shipped from stocks maintained at Champion's various branches throughout the country or were shipped directly from Continental Vinyl upon direction from Champion (JA 159). Thus, for example, the president of Cobra Industries, Incorporated, testified on deposition that the panels utilized by his company were obtained in approximately 105 purchases received from time to time during the period January, 1969 to March, 1970 (JA 159, 361-362); and the vice president of Nauta-Line, Inc., testified on deposition that the panels utilized by his company were obtained pursuant to 52 separate purchase orders (JA 382).

Many of the panels, after being installed in the interiors of vehicles which allegedly were manufactured during 1969 and 1970, proved to be defective and delaminated, the vinyl film peeling away from its plywood base (JA 159). Champion contends that all of the defective panels were panels

purchased from Continental Vinyl. There is nothing in the record to support such contention and, should the source of the panels be relevant, Continental has not conceded and does not concede that they all were purchased from Continental Vinyl (JA 219-222; Defendant's Response to Request for Admissions, pp. 1-2). There also is nothing in the record as to when the panels actually delaminated causing damage to the vehicles in which they were installed.

A large number of claims were asserted against Champion by the manufacturers and by purchasers of the vehicles for the cost of repair or replacement of the panels or for the diminution in the value of the vehicles caused by the delaminations. As above stated, in no single instance did the damage to any single vehicle amount to as much as $5,000 (JA 159).

It is alleged that damage resulted to over 1400 vehicles which were manufactured over a period of many months in 1969 and 1970 by at least 26 different firms. Thus, for example, 224 damaged trailers and campers which were manufactured by Cobra Industries, Incorporated, of Elkhart, Indiana, were produced from April 9, 1969, through November 19, 1969 (JA 159, 364-368). And 260 damaged houseboats manufactured by Nauta-Line, Inc. of Hendersonville, Tennessee, were produced from April 3, 1969, through June 26, 1970 (JA 159).

Champion paid in excess of $1.5 million in settlement of the claims made by the manufacturers and purchasers of the damaged vehicles. This figure includes both amounts paid to the claimants and payments to Liberty Mutual for fees and expenses incurred in the adjustment of the claims (JA 186-193).

The Provisions of the Policies

As noted above, during the period November 30, 1967, to November 30, 1970, Champion was insured by an Umbrella Excess policy issued by Continental which, subject to its terms, afforded excess coverage of $1 million for "any one occurrence", and $1 million "in the aggregate" for each annual period, over primary coverages afforded Champion by some 23 underlying policies including the Liberty Mutual policy.

Since Continental's policy is "excess" over Liberty Mutual's underlying policies, it is evident that the provisions of the Liberty Mutual policies must be construed to determine whether the underlying limits have become exhausted and excess coverage has become available.*

As the District Court noted, the Liberty Mutual policy provisions are standard ones (JA 164). The pertinent provisions are as follows:

Under Coverage B—Property Damage Liability, the Liberty Mutual policy provided as follows:

> "The company [Liberty Mutual] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of property damage to which this policy applies, caused by an occurrence * * *" (JA 491).

* The Continental policy contained a provision that, if there was coverage for loss under the underlying insurances, then excess coverage would be afforded even if the Continental policy contained terms and conditions inconsistent with those of the underlying insurances in respect of such loss (JA 487). It is not disputed in this case that there were no such inconsistent terms and conditions with respect to coverage for "products hazard" property damage.

The term "occurrence" was defined in Section VI, as amended by Endorsement 1, paragraph 7, as follows:

> " 'Occurrence' means an accident, including injurious exposure to conditions, which results, *during the policy period* in bodily injury or property damage neither expected nor intended from the standpoint of the insured * * *" (emphasis added) (JA 493, 500).

The term "property damage" was defined in Section VI as follows:

> " 'Property damage' means injury to or destruction of tangible property" (JA 493). (Champion does not dispute that "tangible property" means *other property* and not the defective product itself [Exclusion (L) at JA 491]. Accordingly Champion is making no claim for the value of the defective plywood panels.)

With respect to policy period and territory, Section V provided as follows:

> "This policy applies only to bodily injury or property damage which occurs *during the policy period* within the policy territory" (emphasis added) (JA 492).

Of the hazards insured against by Liberty Mutual's underlying policy, the one relevant to the instant action was the "products hazard" which was defined in Section VI as follows:

> " 'Products hazard' includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and

after physical possession of such products has been relinquished to others'' (JA 493).

The applicable limits of liability with respect to Coverage B—Property Damage Liability (Section IV, as modified by Endorsement 1, paragraph 4) were as follows:

> ''Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain personal injury or property damage or (3) claims made or suits brought on account of personal injury or property damage, the company's liability is limited as follows:
>
> * * *
>
> ''The total liability of the company for all damages because of all property damage sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of property damage liability stated in the declarations as applicable to 'each occurrence'. [The limit of property damage liability stated in the declarations (JA 490a) as applicable to ''each occurrence'' was $100,000.]
>
> ''Subject to the above provision respecting 'each occurrence', the total liability of the company for all damages because of all property damage to which this coverage applies and described in any of the numbered subparagraphs below shall not exceed the limit of property damage liability stated in the declarations as 'aggregate'. * * * (3) all property damage included within the products hazard * * * [The limit of property damage liability stated in the declarations (JA 490a) as ''aggregate'' was $200,000.]
>
> * * *
>
> ''For the purpose of determining the limit of the company's liability, (1) all personal injury or property damage arising out of continued or repeated ex-

posure to substantially the same general conditions * * * shall be considered as arising out of one occurrence.

"If the same occurrence gives rise to personal injury or property damage which occurs partly before and partly within the policy period, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement" (JA 492, 499).

The deductible provision of $5,000 per occurrence for property damage liability was contained in Endorsement 8 (JA 510-511) which specifically provided that "This endorsement applies only to Property Damage arising out of the completed operation hazard or product hazard". The endorsement provided, in part, as follows:

"1. The company's obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages on behalf of the insured applies only to the amount of damages in excess of any deductible amounts stated in the schedule below as applicable to such coverages.

"2. The deductible amounts stated in the schedule apply as follows:

* * *

(b) Per Occurrence Basis—If the deductible is on a 'per occurrence' basis, the deductible amount applies under the Bodily Injury Liability or Property Damage Liability Coverage, respectively, to all damages because of all bodily injury or property damage as the result of any one occurrence.

"3. The terms of the policy including those with respect to (a) the company's rights and duties with re-

spect to the defense of suits and (b) the insured's duties in the event of the occurrence apply irrespective of the application of the deductible amount.

"4. The company may pay any part or all of the deductible amount to effect settlement of any claim or suit and, upon notification of the action taken, the named insured shall promptly reimburse the company for such part of the deductible amount as has been paid by the company" (JA 510).

Argument

Outline of Argument

As Judge Solomon's opinion pointed out, Continental admits that the type of loss involved in the instant case falls within the "products hazard" coverage of the policies (JA 164). This admission is based on the fact that numerous Courts in similar situations, with none *contra*, have held that the type of loss here involved is within the "products hazard" coverage. *Sturgis Manufacturing Company* v. *Utica Mutual Insurance Company*, 37 N.Y.2d 69, 371 N.Y.S.2d 444, 332 N.E.2d 319 (1975); *Goodyear Rubber & Supply Company, Inc.* v. *Great American Insurance Company*, 471 F.2d 1343 (9th Cir., 1973); *Bowman Steel Corporation* v. *Lumbermen's Mutual Casualty Company*, 364 F.2d 246 (3rd Cir., 1966); *Pittsburgh Plate Glass Company* v. *Fidelity & Casualty Company of New York*, 281 F.2d 538 (3rd Cir., 1960); *Dakota Block Company* v. *Western Casualty & Surety Company*, 132 N.W.2d 826 (S. Dak., 1965); *Hauenstein* v. *St. Paul-Mercury Indemnity Company*, 242 Minn. 354, 65 N.W.2d 122 (1954).

Continental's Umbrella Excess policy was the third layer of insurance available to Champion. The first two layers were (1) self-insurance represented by the $5,000 per "occurrence" deductible in the Liberty Mutual policies; and (2) the "$100,000 each occurrence; $200,000 aggregate" limits of liability of each annual Liberty Mutual policy. Only after the deductible had been satisfied and the limits of liability of the Liberty Mutual policies exhausted, could the third layer of insurance, Continental's Umbrella Excess policy, be called upon to respond.

In order to determine if the coverage of the Umbrella Excess policy was reached, and if so, to what extent, it is necessary (1) to identify the "occurrences" which gave rise to Champion's losses, (2) to establish the amount of loss resulting from each such "occurrence," and (3) to apply the deductible and limits of liability of the Liberty Mutual policies.

As set forth below, an "occurrence" is the event for which the insured becomes liable and not an antecedent proximate cause of the event (Point I); the limits of liability of the underlying Liberty Mutual policies were not exhausted (Point II); there was a failure to show that the property damage for which recovery is sought occurred during the policy period (Point III).

POINT I

An occurrence is the event for which the insured becomes liable in damages and not an antecedent proximate cause of the event.

As above pointed out, the Liberty Mutual policy defined "occurrence" as follows:

> " 'Occurrence' means an accident, including injurious exposure to conditions, which results, during the policy period in bodily injury or property damage neither expected nor intended from the standpoint of the insured * * *" (JA 493, 500).

It is well established and uniformly held, in accordance with the clear language of the policy, that the term "occurrence" or "accident" as used in liability policies refers to the event for which the insured becomes liable in damages, *i.e.*, the bodily injury or property damage for which recovery is sought, and not to some antecedent proximate cause of the event. Thus as respects the products hazard, the "occurrence" does not take place when the product is produced or sold or delivered but only when the damage (whether bodily injury or property damage) for which the insured becomes liable occurs. *Arthur A. Johnson Corporation* v. *Indemnity Insurance Company of North America*, 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959)*; *Sturgis Manufacturing Company* v. *Utica Mutual Insurance Company*, 37 N.Y.2d 69, 371 N.Y.S.2d 444, 332 N.E.

* Champion has contended, and Continental has not disputed, that New York law applies to the construction of the instant policies. We believe, however, that the New York law is not in conflict with the holdings of any other jurisdiction.

2d 319 (1975); *Palardy* v. *Canadian Universal Insurance Company*, 360 F.2d 1007, 1009-1010 (2nd Cir., 1966); *Brown* v. *First Insurance Company of Hawaii*, 424 F.2d 680, 681-682 (9th Cir., 1970); *Hamilton Die Cast, Inc.* v. *United States Fidelity and Guaranty Company*, 508 F.2d 417, 420 (7th Cir., 1975); *Hagen Supply Corporation* v. *Iowa National Mutual Insurance Company*, 331 F.2d 199, 202-203 (8th Cir., 1964); *St. Paul Fire and Marine Insurance Company* v. *North Grain Company*, 365 F.2d 361, 365 (8th Cir., 1966); *Hamilton* v. *Security Insurance Company of New Haven*, 378 F.2d 46, 48 (5th Cir., 1967); *Ketona Chemical Corporation* v. *Globe Indemnity Company*, 404 F.2d 181, 185-186 (5th Cir., 1968); *Maurice Pincoffs Company* v. *St. Paul Fire and Marine Insurance Company*, 447 F.2d 204, 206 (5th Cir., 1971).

To illustrate from some of the cited cases:

In *Palardy* v. *Canadian Universal Insurance Company*, *supra*, this Court, in holding that the policy did not cover a ladder manufacturer for liability for an injury which occurred following cancellation of the policy, although the ladder was sold during the policy period, said:

> "The policy is also expressly insured against Moulton's liability for *accidents*, which occurred within the policy period, and not against *products produced* by Moulton within the policy period, which at any indefinite time in the future might cause accidents. The clause defining the policy period said,
>
> "'This policy applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, or Canada.'" (emphasis by the Court) 360 F.2d at 1009.

In *Hamilton Die Cast, Inc.* v. *United States Fidelity and Guaranty Company, supra,* the Seventh Circuit, rejecting the contention that the "products hazard" covered tennis racket frames which did not cause bodily injury or property damage to other property, said:

> "The policy does not, however, cover 'an occurrence of alleged negligent manufacture'; it covers negligent manufacture that results in 'an occurrence'." 508 F. 2d at 420.

In *Home Insurance Company* v. *The Aetna Casualty and Surety Company,* Docket No. 75-7357 (2nd Cir., January 13, 1976), slip op. 1489, a "products hazard" property damage case decided in the District Court by Judge Carter, Index No. 74 Civ. 4164, Opinion No. 42,308 (S.D.N.Y., April 24, 1975), this Court reversed "the granting of summary judgment" on the disputed meaning and intention of the "batch clause" which had been added to the insurance policy. This Court, however, left undisturbed what, we respectfully submit, was Judge Carter's lucid and thorough analysis of the two problems which necessarily preceded a consideration of the applicability of the "batch clause", namely (1) what is the meaning of "occurrence", and (2) how is the number of "occurrences" in a given case determined. Judge Carter, relying on the leading New York Court of Appeals case of *Arthur A. Johnson Corporation* v. *Indemnity Insurance Company of North America,* 7 N.Y. 2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959), held as follows (footnotes omitted):

> "Even if it is conceded that Diamond Shamrock's production mistakes at the Harrison Plant were the initial causative factors in producing the damage, defendants are clearly in error in arguing that such production

mistakes were themselves 'occurrences' or 'accidents' under the terms of the Aetna policy. In *Arthur A. Johnson Corp.* v. *Indemnity Insurance Co.*, 7 N.Y. 2d 222, 228-29, 196 N.Y.S.2d 673, 682-83 (1959), the New York Court of Appeals rejected the view that the policy term 'accident' referred to an act by the insured, and that the number of 'accidents' was dependent on the number of acts by the insured which proximately caused the damages.

* * *

"Applying this test, the court [in *Johnson*] concluded that there had been two events. Significantly, the court stated that in each instance, the '*accident*' was the collapse of the wall, *not* the defendant's negligent act in constructing the wall which was the proximate cause of the damage. 7 N.Y.2d at 230, 196 N.Y.S. 2d at 684. In reaching the conclusion that there had been *two* accidents, rather than one, the court relied on two factors: (1) the collapse of one wall was distinguishable in *time* and *space* from the collapse of the other; and (2) the collapse of one wall did not *cause* the collapse of the other.

"Applying *Johnson* to the instant case, it is clear that the 'accidents' and hence the 'occurrences' were not Diamond Shamrock's acts in manufacturing the defective resin, even if these acts were the proximate cause of the damage. Rather, the 'accidents' appear to be events in the causal chain which *immediately* preceded or occurred simultaneously with the damage. In *Johnson* the accidents were the collapse of the walls; in the instant case, the accidents were the feeding of the chickens with the defective chicken feed or their ingestion of the poison." (emphasis by the Court) Opinion of Carter, D. J., *supra*, at pp. 6-9.

In *Maurice Pincoffs Company* v. *St. Paul Fire and Marine Insurance Company, supra,* the insured joined both its primary insurer and umbrella excess insurer. The issue was whether there had been only one "occurrence" or several "occurrences" in order to determine whether the underlying policy limits had been exhausted by payment of the one occurrence limit of $50,000 or whether the underlying policy was liable for its aggregate limit of $100,000. The facts were that certain bird seed had been contaminated at one source prior to sales by the insured to several different buyers who fed the seed to their flocks of birds.

The Fifth Circuit held that there had been several occurrences:

> "We think that the 'occurrence' to which the policy must refer is the occurrence of the events or incidents for which Pincoffs is liable. It was the sale of the contaminated seed for which Pincoffs was liable. Although the cause of the contamination is not clear, it seems apparent that Pincoffs received the seed in a contaminated condition and did not itself contaminate the seed. However, it was not the act of contamination which subjected Pincoffs to liability. If Pincoffs had destroyed the seed before sale, for instance, there would be no occurrence at all for which the insured would be liable. But once a sale was made there would be liability for any resulting damages. It was the sale that created the exposure to 'a condition which resulted in property damage neither expected nor intended from the standpoint of the insured,' under the definition of the policy. And for each of the eight sales made by Pincoffs, there was a new exposure and another occurrence." 447 F. 2d at 206.

We believe it is clear that in *Pincoffs* the Court applied the same reasoning as is uniformly found in the cases

dealing with the question of what constitutes an occurrence. With respect to the references in *Pincoffs* to "sales", we respectfully believe that the clear import of the opinion was that since sales had been made to eight different purchasers, each of whom had fed the seed to his separate flock of birds, where no feeding of one flock had any effect on any other flock, there had been at least eight occurrences. Since all the Court had to determine was whether there had been one or more than one "occurrence", it was enough to find that "* * * for each of the eight sales made by Pincoffs, there was a new exposure and another occurrence." 447 F.2d at 206.

Brown v. *First Insurance Company of Hawaii, supra,* a Ninth Circuit case decided in 1970, may cast some light on what Judge Solomon might have had in mind in saying in his opinion in the instant case that "on this issue I find in favor of the plaintiff because I find that the contested language is ambiguous" (JA 164). As above pointed out, Judge Solomon did not indicate which "contested language" was "ambiguous". In *Brown*, Judge Solomon, sitting in the District Court, had found ambiguity in the word "accident" as contained in the policy provision that "[t]his policy applies only to *accidents which occur during the policy period* within the United States of America, its territories or possessions, Canada or Newfoundland" (emphasis by the Court), and had held that the "ambiguity" permitted the word "accident" "to mean the *sale* of defective merchandise" (emphasis by the Court), thus covering bodily injury which occurred after the termination of the policy where the sale occurred during the policy period. The insurance company had contended that the word meant

"the unexpected happening resulting in injury". 424 F.2d at 682. On this point, a District Judge sitting in Hawaii and construing exactly the same policy in a related case had previously held that the quoted language was not ambiguous and did not cover sales that took place during the policy period where the event for which the insured became liable, *i.e.*, the injury, occurred after the policy terminated. The Ninth Circuit had previously affirmed the Hawaii District Court on this point and, in reversing Judge Solomon's decision, said:

> "We agree with the finding of the trial court in *Chapman* v. *First Insurance Co. of Hawaii, supra,* that the contract was not ambiguous. In that respect, we affirmed the district court. The basis of our ruling [in this case] is not collateral estoppel, but *stare decisis.*" 424 F.2d at 682.

In summary on this point, we submit that it is well established and uniformly held that the term "occurrence" or "accident" as used in liability policies refers to the event for which the insured becomes liable in damages and not to some antecedent proximate cause of the event. Assuming that Champion from time to time made purchases of defective panels from Continental Vinyl, it seems unquestionable that such purchases did not constitute "occurrences" under the policies. It seems equally unquestionable that the sales of such defective panels made from time to time to manufacturers of vehicles did not constitute "occurrences" since, as Champion concedes, if Champion had recalled the panels before they were installed in the vehicles, there would have been no "occurrences" under the policies.

The events for which Champion became liable in damages were the delaminations that occurred after defective panels had been installed in the vehicles. There is no doubt and no dispute that such delaminations took place in many locations throughout the country over a period of many months and that the delamination in any one vehicle had no harmful effect on any other vehicle.

POINT II

The limits of liability of the underlying Liberty Mutual policies were not exhausted.

There may indeed be cases where a serious question may arise as to whether one or more than one "occurrence" took place, but, it is submitted, this case is not one of them. The test is whether the "occurrences," *i.e.*, the events for which the insured must respond in damages, are distinguishable in time and space. The distinction is made clear in the two New York Court of Appeals cases of *Arthur A. Johnson* v. *Indemnity Insurance Company of North America*, 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959) and *Hartford Accident & Indemnity Company* v. *Wesolowski*, 33 N.Y.2d 169, 350 N.Y.S.2d 895, 305 N.E.2d 907 (1973).

In *Johnson*, the Court held that there were two accidents where, during a heavy rainfall, two faulty temporary retaining walls collapsed, one 50 minutes after the other, causing damages to two different but adjoining buildings. The Court noted, among other things, that one collapse happened almost an hour after the other and in no way caused the other, and observed that "* * * if the walls were located

blocks away from each other on different job sites but subject to the same rainfall, no one could contest that there were two accidents." 7 N.Y.2d at 230, 196 N.Y.S.2d at 684, 164 N.E.2d at 708.

In *Hartford,* the Court held that there was only one accident where personal injuries were sustained by several persons when the insured's automobile struck an oncoming vehicle, ricocheted off, and struck a second automobile more than 100 feet away. The Court noted that "Unlike *Johnson* in which there was a 50-minute elapsed interval between the collapse of the first and second cellar walls, the two collisions here occurred but an instant apart. The continuum between the two impacts was unbroken, with no intervening agent or operative factor. We think in common understanding and parlance there was here but a single, inseparable 'three-car accident'." 33 N.Y.2d at 174, 350 N.Y.S.2d at 899-900, 305 N.E.2d at 910.

The New York rule, in short, applies the terms "accident" and "occurrence" in their common sense of "an event of an unfortunate character that takes place without one's foresight or expectation." 7 N.Y.2d at 228, 196 N.Y.S.2d at 683, 164 N.E.2d at 707. If in the common understanding and parlance there has been but one event, there has been but one "accident" or "occurrence"; if there has been more than one event, distinguishable in space and time, there has been more than one "accident" or "occurrence." Applying this rule of common sense to the facts in the instant case, there can be no doubt that the delaminations at different times, in widely separated parts of the country, in some 1400 separate vehicles manufactured

by at least 26 different firms over a period of many months, where the delamination in any one vehicle had no harmful effect on any other vehicle, were separate events, distinguishable in space and time, and therefore separate "occurrences."

A case strikingly similar to the instant case was *Elston-Richards Storage Company* v. *Indemnity Insurance Company of North America*, 194 F.Supp. 673 (W.D. Mich., 1960). This case was affirmed on opinion below in 291 F.2d 627 (6th Cir., 1961). In *Elston-Richards*, the insured was a warehouseman. Forty-two hundred dryer and combination washer-dryer appliances were damaged by a defective fork-lift truck over a period of some nine months. The insurance policy contained a $2,500 deductible per event or occurrence. No single lifting operation of the fork-lift truck caused damage amounting to as much as $2,500. The insured argued that as all of the damage to the appliances resulted from one cause, that is, the operation of the defective fork-lift truck, all of the damage constituted "one event or occurrence". The insurer contended that the damage to each appliance constituted "one event or occurrence" and that, since the parties had agreed that the damage to any one appliance did not exceed the deductible amount of $2,500 per occurrence, there was no coverage. In granting judgment for the insurer, the Court held as follows:

> "The words 'event' and 'occurrence' are synonymous and are words of common use and meaning. The phrase 'arising from one event or occurrence' in the limits-of-liability provision of the policy here in question is not ambiguous or misleading and was certainly not in-

tended to apply collectively to events or occurrences happening many months apart.

"Each of the many Whirlpool appliances that were damaged while stored in plaintiff's warehouse was damaged at a different time during a period of about nine months, and each appliance was damaged by a separate impact of pressure by a carton-clamp assembly. Although the damage to each appliance may have resulted from a single cause, that is, the manner in which the new clamp assembly on the new lift truck was operated, the damage to each appliance was a separate accident and therefore 'one event or occurrence' within the meaning of those words as used in defendant's policy." 194 F. Supp. at 682.

Champion, in arguing in the proceedings below that there was but one "occurrence", placed some reliance on the following provision of the Liberty Mutual policy:

"For the purpose of determining the limit of the company's liability, (1) all personal injury or property damage arising out of continued or repeated exposure to substantially the same general conditions * * * shall be considered as arising out of one occurrence" (JA 492, 498-499).

The meaning and intention of the quoted provision, we submit, is clear and the provision plainly is not applicable to the instant facts. The policy provides that "occurrence means *an* accident * * *". An accident is an event which causes personal injury or property damage neither expected nor intended from the viewpoint of the insured (see cases cited at pages 22-23 *supra*). It would not be doubted that a sudden explosion or floor collapse would constitute an occurrence or accident. But what about an

accident which is not sudden but gradually causes injury or damage by creating injurious conditions which are not immediatelv detected, for example, undetected harmful emissions given off by a defective X-ray machine or undetected fumes from a defective oil burner? The definition of "occurrence" (JA 500) answers this question by providing that an accident *includes* "injurious exposure to conditions which results during the policy period in bodily injury or property damage". This unmistakably means that the insurer is agreeing that for there to be "*an* accident", it is not necessary that the element of suddenness be present.

There is no room for a contention that an "occurrence" does not mean, as the definition says, "*an* accident" but means a series of "accidents" of the same general type. The quoted provision simply provides that an accident involving undetected exposure to injurious conditions is treated in precisely the same manner as an accident involving a sudden event such as an explosion, namely, that the "one occurrence" limit of liability is applied regardless of the time element or the number of claimants. We submit that the clause cannot be reasonably contended to mean that injuries caused, for example, by separate similarly defective X-ray machines in different parts of the country at different times or damages caused by separate defective oil burners in different structures in different parts of the country at different times, constitute "one occurrence".

The provision refers to the "exposure to substantially the *same* general conditions." It does not refer to exposure to substantially *similar* general conditions. The delamination of a plywood panel in a motor home in New

York, if it can be characterized as a "condition" at all, may be similar to the delamination of a plywood panel in a houseboat in California but there is no way in common parlance that the two can be said to be the "same."

The coverage afforded by liability policies would be sharply restricted if numerous accidents were covered only by the "one occurrence" limit of liability merely because they were similar in nature. It cannot be believed that any insured under a Comprehensive General Liability Policy, absent a deductible, would ever contend that there was no coverage beyond the "one occurrence" limit for *similar* accidents. It is obvious that in most, if not all, cases a major purpose of an insured, including Champion, is to obtain coverage against the type of similar accidents foreseeable from the nature of the insured's business activities. It is indisputable, for example, that no seller of motors or gauges or oil burners or X-ray machines which proved to have similar defects would ever expect or reasonably understand that regardless of how many separate accidents took place causing personal injury or property damage at different times and in different places, whether within one policy period or several, the insurer's total liability would be the same as if there had been only one accident.

In the instant case, is it conceivable that if one of Champion's other products such as food packagings, pharmaceuticals or cosmetics (Exhibit 8, tab 6) had been contaminated causing serious bodily injuries, or if the panels, instead of merely delaminating, had been highly flammable causing numerous fires in many vehicles in various parts of the country over a period of at least two years resulting

in serious property damage and bodily injuries, that Champion would insist that its coverage is limited to "one occurrence" in one annual period?

In summary on this point, the damage to each vehicle constituted a separate occurrence. Since, admittedly, the damage to any one vehicle did not exceed the $5,000 "per occurrence" deductible, the coverage of the underlying Liberty Mutual policies was not reached, much less exhausted. There can be, therefore, no recovery from Continental under its Umbrella Excess policy.

POINT III

There was a failure to show that the property damage for which recovery is sought occurred during the policy period.

The underlying Liberty Mutual policies and Continental's Umbrella Excess policy both require that the property damage for which the insured becomes liable must occur within their respective policy periods in order to be covered. Thus each Liberty Mutual policy expressly provides that "This policy applies only to * * * property damage which occurs during the policy period" (JA 492) and Continental's Umbrella Excess policy expressly provides that "This policy applies only to occurrences happening during the policy period" (JA 449), defining "occurrence" as "an event or continuous or repeated exposure to conditions which unexpectedly causes * * * physical injury to or physical destruction of tangible property, including the loss of use thereof, during the policy period * * *" (JA 451).

There is, however, no evidence in the record as to when the property damage giving rise to Champion's losses occurred because the District Judge believed, and expressly and repeatedly held, that the dates when the delaminations took place were not material to the determination of this case (JA 246, 251, 260, 274, 284). In fact, the purported record of payments in settlement of claims (Exhibit 2), admitted by the Court *sua sponte* over Continental's objection and after Champion had withdrawn its offer, indicates that the bulk of the payments were made in 1971, 1972, 1973, and even as late as 1974, long after the end of Continental's policy period. While, of course, the times of the payments do not necessarily indicate the times when the property damage occurred, the continued making of payments long after November 30, 1970, at least suggests the possibility, in the absence of evidence to the contrary, that the bulk of the delaminations occurred after the end of Continental's policy period.

The District Court in its opinion on the liability issue referred to one provision as follows:

> "The Liberty policy contained a provision on occurrences which result in damage over a long period:
>
> " 'If the same occurrence gives rise to * * * property damage which occurs partly before and partly within the policy period, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement' " (JA 161).

We believe that this clause strongly supports the position here urged by Continental, namely that the policies,

as their explicit language provides, cover only property damage "which occurs during the policy period". The clause plainly is intended to avoid double coverage for bodily injury or property damage constituting "one occurrence" merely because of the happenstance that a part of the damage happens in one policy period and part in the succeeding policy period. For example, if a defective oil burner, an hour or moments before the expiration of the policy period, began giving off damaging emissions which caused property damage during that short period and additional damage in the next hour or two before it was discovered, there would be one occurrence, *i.e.*, a single accident causing damage, in two separate policy periods. The fact that the coverage of each policy is limited to damage which occurs during the policy period" might permit an argument that the two successive policies should each respond to the extent of its "one occurrence" limit of liability. To avoid such doubling of coverage for one occurrence, the clause in question was included. If each policy did not provide that it applied "only to personal injury or property damage which occurs during the policy period" (*e.g.*, if, as apparently held by the Court below, the policy afforded only single coverage for all liability traced to sales within the policy period no matter when the damage occurred), there would be no need for this clause in the policy.

Since there is no evidence of when the property damage for which Champion became liable occurred, Champion has failed to prove that the damage is within the coverage of Continental's Umbrella Excess policy. The lack of evidence of when the property damage occurred also precludes any determination of which, and how many, of the annual Liberty Mutual policies must respond.

Summary

1. An "occurrence" is the event for which the insured becomes liable and not an antecedent proximate cause of the event;

2. The limits of liability of the underlying Liberty Mutual policies were not exhausted; and

3. There was a failure to show that the property damage for which recovery is sought occurred during the policy period.

Conclusion

The judgment below should be reversed and the complaint dismissed.

Respectfully submitted,

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